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In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEWS SYNDICATE COMPANY, INC., AND NEW YORK MAILERS' UNION NO. 6, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit entered on May 20, 1960, denying enforcement of an order issued by the Board against respondents.

OPINIONS BELOW

The opinion of the court of appeals (App. 22–42),[1] is not yet officially reported. The findings of fact, conclusions of law, and order of the Board (R. 635–695, 703–728, 751–760) are reported at 122 NLRB 818.

[1] "App." refers to the appendix to this brief; "R." to the Joint Appendix filed in the court of appeals.

JURISDICTION

The opinion of the court of appeals was filed on May 20, 1960 (App. 22–42) and its decree was entered on June 8, 1960 (App. 42–43). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 146, 29 U.S.C. 160(e)).

QUESTIONS PRESENTED

The principal question presented is whether the Board may properly conclude that a collective bargaining agreement which purports to incorporate union working rules "not in conflict with * * * federal or state law," but does not particularize what rules are excluded as illegal, encourages union membership in violation of the National Labor Relations Act, in that employees would tend to view the contract as including the rules requiring union membership as a condition of employment.[2]

[2] In addition, the following subsidiary questions are presented:

(*a*). Whether the Board properly concluded that the contract also incorporated union working rules establishing a priority and seniority system among union members, and thus unlawfully delegated to the union control over employment priority and seniority.

(*b*). Whether the Board properly concluded that contract provisions vesting exclusive control over employment in union foremen, who were bound by membership obligations to follow union rules requiring employees to be union members, were unlawful in that they further manifested an agreement to operate under closed-shop conditions, and improperly delegated exclusive control over hiring to the union.

These questions are so directly related to, and intertwined with, the principal question that, if the Board's position in re-

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained,

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spect to the latter should be sustained, it would be appropriate for these subsidiary questions also to be reviewed. In order to preserve the Board's position in regard to these issues, they are specifically presented herein.

or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his fail-

ure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. *The contract and by-laws provisions.* Respondent Union, affiliated with the International Typographical Union, represents employees in the mail rooms of all New York City newspaper publishers. In December 1954, and again in 1956, respondent News Syndicate Company, Inc. (hereinafter called the News), publisher of the New York Daily News, signed collective bargaining contracts negotiated by the Publishers' Association of New York City and the Union. The publisher of the Wall Street Journal (hereinafter called the Journal) signed similar contracts with the Union.[3] Section 24 of the contract provided that the General Laws of the International Typographical Union (herein called the ITU) "not in conflict with this contract or with federal or state law shall govern relations between the parties on conditions not specifically enumerated herein" (R. 641-642; 534).

Section 5 of the contract limited mail room employment to "journeymen and apprentices" (R. 529). The ITU General Laws, however, provided that journeymen and apprentices must be ITU members and that each local union must establish a system of em-

[3] All New York City newspaper publishers affiliated with the Association subscribed to the 1954 and 1956 contracts (R. 527).

ployment priority and seniority among union members (R. 641–646; 554–558).[4]

Section 4 of the contract provided that mail room superintendents, foremen, and assistant foremen must

[4] The relevant provisions of the General Laws are as follows:

ARTICLE V—FOREMEN

Section 11. All persons performing the work of foremen or journeymen, at any branch of the printing trade, in offices under the jurisdiction of the International Typographical Union, must be active members of the local union of their craft and entitled to all privileges and benefits of membership.

ARTICLE VII—MACHINES

Section 1. * * * None but members [of the ITU] shall be permitted to operate, maintain and service any mailing machinery or equipment when used on work under the jurisdiction of the International Typographical Union. * * *

Section 2. In machine offices under the jurisdiction of the International Typographical Union, no person shall be eligible as a "learner" on machines who is not a member of the International Typographical Union, * * *

ARTICLE VIII—MACHINE TENDERS AND MACHINISTS

Section 1. All machine tenders and machine tenders and machinists, members engaged in the adjustment, repair, and maintenance of all mechanical devices used in the performance of * * * mailing room work shall be members of the [ITU] * * * All work pertaining to maintenance and care of machines is to be performed exclusively by machine tenders who are journeymen or apprentice members of the [ITU].

ARTICLE X—PRIORITY

Section 2. Subordinate unions shall establish a system for registering and recording priority standing of members in all chapels, which shall be conspicuously posted or kept in a place within the chapel accessible to members

be members of the Union, and Sections 20a and 20b vested exclusive control over the mail room employment in the foremen (R. 648–649; 529–530, 532–534). The Union's Constitution and By-Laws imposed on all members the obligation to observe all union rules, including those restricting employment to union members (R. 650–651; 539–546, 554–558).

2. *The hiring practices.* The Board's findings as to the respondents' hiring practices—which, however,

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at all times. The priority standing of a member shall stand as recorded.

Section 5. Any member engaged to serve the International Typographical Union, a subordinate union or to perform work in the interest of the organized labor movement, or any member incapacitated by illness, shall not be deprived of priority standing while so employed or so incapacitated. Such member shall employ while absent the priority substitute competent to perform the work if one is available. The situation holder shall not suffer loss of situation or priority in the event such a substitute is not available. After thirty calendar days the situation shall be filled by priority substitute and considered in the category of a new situation. Upon reporting for duty full priority rights shall be restored.

Section 6. Available priority substitute competent to perform the work must be employed on any new situation created because of the absence of a situation holder from his or her situation for more than thirty calendar days, and whose priority is protected under the provisions of other sections of I.T.U. laws or contracts: *Provided*, Should a substitute with greater priority become available such substitute shall be placed on said situation: *Provided, further*, Local unions may establish by contract, for the purpose of avoiding multiple changes in preferred shifts and starting times, for the employment of the available priority substitute after thirty calendar days and continuing to but not more than ninety calendar days from absence of situation holder.

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were, in large part, set aside by the court of appeals—were as follows:

In practice, the Union foremen at the News and Journal mail rooms hired employees pursuant to a priority system which gave preference in employment to union members (R. 663; 540–546, 557–558). The hiring procedure may be summarized as follows:[5] The foreman initially selected for an evening's work union members whose names appeared on lists furnished by the chapel chairmen or job stewards. The names of fulltime employees, known as "regular situation holders," appeared on one list (R. 664; 14–15, 142, 546–549). The second list contained the names of "regular substitutes"—those who substituted for regular situation holders and were first selected for "extra" work when the size of the paper required the employment of additional mailers (*ibid.*). The foreman hired from these lists in priority order based on the date when the union member had deposited his union card with the chapel chairman (R. 664; 142–143, 171, 261–264). The foreman next hired union members from other papers who "shape the shop," taking first men who had not worked five days that week and then men who had already worked that period (R. 665; 14, 121, 143–144). Finally, if extra help was still needed after the supply of union men had been exhausted, the foreman hired non-union shapers (R. 1230; 15, 122, 144).[6]

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[5] Substantially the same hiring procedure was in effect in the mail rooms of all New York City newspaper publishers (R. 663; 123)

[6] While a seniority list for non-union shapers was not part of the Union's priority system, the foremen at the News and

Nor does it appear that the mail room foremen at the News and Journal ever deviated from this system of employment priority. Thus, while some non-union shapers had worked in the News mail room for over 10 years, performing virtually all operations, the foreman nevertheless required that outside card men, even though they had never before worked at the News, be hired before any non-union shaper (R. 666; 17–19). And, when employees at the News protested against the hiring of unusually large numbers of outside card men, who had shaped on the eve of a holiday for the double pay involved, Superintendent Rottenberg, the Union foreman in charge of the mail room, simply stated that he could do nothing about it because union men had to go to work ahead of the non-union men (R. 667; 93). Similarly, when vacation replacements were needed at the Journal during the summer of 1956, Foreman Every authorized the chapel chairman to get union men from other shops, who were then hired before non-union men who regularly shaped for work, including employee Julius Arrigale (R. 666; 405).

The Union also administered the apprenticeship and competency programs so as to prefer its members. Under the contract, a non-union mail room worker could gain journeyman status, and so qualify for regular employment, only by completing a six-year apprentice training program or by passing a competency test (R. 1291–1292; 533–534). The mail

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Journal maintained such lists based on the first date of employment at their mail rooms (R. 665–666; 144, 162).

room foreman had the exclusive right under the contract to hire apprentices (*ibid.*). He also served under the contract as an "impartial examiner," who, together with the Union's membership committee, administered competency tests to prospective journeymen, who were invariably persons selected by the Union for induction into union membership (R. 1292; 204, 206, 215).

In practice, these programs were operated as follows: When the Union decided that more regular mail room employment was available, it substantially curtailed the prescribed six-year apprenticeship program so that its apprentices could take the competency test (R. 707; 483–484). And, in the spring of 1956, in order to have its members perform the increased amount of work that had become available in the New York City newspaper mail rooms, the Union decided to accept into membership, and give competency tests to, 125 non-union extras (R. 668–669; 123–124, 179–181).[7] The publishers, including the News, did not participate in the decision to enlarge the Union's membership or in arranging the method by which eligibility for membership, and consequently more regular employment, was to be determined. They merely furnished the Union with requested data (R. 669; 124–125).

At the News, the Union selected 31 of 60 employees on Union Foreman Rottenberg's list of the non-union

[7] Insofar as the record shows, no employee selected for induction into the Union ever failed to pass the competency test (R. 707, n. 5).

extras who had received the greatest amount of extra work in 1954 and 1955 (R. 660; 180). Of these, 30 ranked below employee Burton Randall. They were all inducted into union membership on June 10, 1956, were placed on the Union's priority list of regular substitutes, and, from June 15 on, were selected for work before Randall (R. 673–674; 48, 148–149). As a consequence, Randall, who shaped regularly on Friday and Saturday evenings, was required to work later hours, perform more difficult and tedious work, and lost overtime pay (R. 674; 20–23, 56).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the News violated Section 8(a) (1) and (3), and the Union Section 8(b) (1)(A) and (2) of the Act, by their contract arrangements and by operating an unlawful closed shop and preferential hiring system. In the Board's view, the contract clause purporting to incorporate ITU General Laws "not in conflict with * * * federal or state law," evaluated in light of foreseeable employee reaction, in effect incorporated those portions of the Laws providing for a closed shop and delegating to the Union complete control over employment priority and seniority. Moreover, the Board found that the contract provisions vesting exclusive control over employment in union foremen, who were bound to follow the Union's laws, also evidenced an intent to operate under closed-shop conditions, and delegated exclusive control over hiring to the Union without the requisite safeguards established by the Board in

Mountain Pacific Chapter of the Associated General Contractors, Inc., 119 NLRB 883[*] (R. 646–647, 662–663, 705–709).

As to practice, the Board found that mail room foremen actually hired pursuant to a priority system based upon the laws and constitutions of the ITU and the respondent local union, and that the apprenticeship and competency systems established in the contract were so operated as to give unlawful preference for jobs to union members (R. 672–673, 705–708). In addition, the Board found that two non-union employees, Burton Randall at the News, and Julius Arrigale at the Journal, were discriminatorily denied employment opportunities as a direct result of the unlawful preferential hiring system in effect at the mail rooms of the News and the Journal (R. 675–677, 679–680).

In relevant part, the Board's order (R. 712–719, 728, 752–753) requires the News to cease and desist from its violations of Section 8(a) (1) and (3), and from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act. Affirmatively, the order requires the News to specify in its current contract with the Union that the provisions of the ITU General Laws found illegal by the Board are not incorporated in the contract, and to indicate which provisions of the Laws are incorporated and operative; to notify mail room employees that they are not bound to follow

[*] The Board's *Mountain Pacific* principle is before the Court in *Local 357, Teamsters* v. *National Labor Relations Board*, certiorari granted, June 27, 1960, No. 64, this Term.

provisions of the Laws which call for a closed shop or union preferential hiring; to reimburse all employees and former employees in the mail room for dues and assessments paid to the Union for a period beginning six months before the date of the filing and service of the charges against it; and to post an appropriate notice.

In parallel terms, but extended to cover all New York City newspaper publishers, the order requires the Union to cease and desist from its correlative violations of Sections 8(b) (1)(A) and (2) of the Act, and to take substantially the same affirmative action as the News.

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals denied enforcement of the Board's order. The court held that the clause in the contract purporting to incorporate only ITU General Laws "not in conflict * * * with federal or state law" must be taken at face value, and hence the contract could not be deemed to include the closed-shop provisions in the Laws. It distinguished its prior decision in *Red Star Express Lines* v. *National Labor Relations Board,* 196 F. 2d 78, on the ground that there is a difference between specifically setting forth illegal union-security provisions in the contract and then purporting in an addendum to suspend any "illegal" clauses (the situation in *Red Star*), and incorporating only the "legal" provisions of union rules some of which are illegal (the situation here). In the court's view, the "natural and foreseeable consequence" of the latter type of provision, unlike that

of the former, would not be to encourage union membership (App., pp. 28–29, *infra*).

The court further found that the contract did not delegate to the Union exclusive control over seniority or hiring, and was not otherwise unlawful. The court also rejected the Board's finding that respondents, in practice, maintained and enforced unlawful closed-shop and preferential employment conditions, and that the apprenticeship and competency systems established in the contract were so operated as to give unlawful preference for jobs to union members. In the court's view of the evidence, the hiring practices were based on valid criteria of competency and dependability and only coincidentally resulted in union members being hired first. Finally, based on these findings as to hiring practice, the court concluded that Randall and Arrigale had not been discriminatorily denied employment opportunities (App., pp. 31–41).*

REASONS FOR GRANTING THE WRIT

1. The decision of the court below, that the coercive force on employees of union rules which condition employment on union membership is dissipated by a provision that those rules are incorporated into a collective bargaining agreement only insofar as "not in conflict with * * * federal or state law," is in ac-

* The court did, however, agree with the Board's finding that employee Burton Randall at the News was denied one night's work because he filed an unfair labor practice charge against respondents. But, since this matter covered "so small a portion" of the Board's order, the court denied the petition for enforcement *in toto* and left it for the Board, "if so advised," to enter an order consistent with the court's opinion (App., pp. 41–42).

cord with *Honolulu Star-Bulletin* v. *National Labor Relations Board*, 274 F. 2d 567 (C.A.D.C.).[10] However, it is in conflict with that of the Court of Appeals for the First Circuit in *International Typographical Union* v. *National Labor Relations Board*, 278 F. 2d 6, decided May 10, 1960. In that case, the court sustained Board findings that the International Typographical Union and two affiliated locals had violated the Act by insisting upon, and striking for, collective bargaining agreements containing "Laws" and foreman clauses identical with the clauses here involved. The First Circuit, contrary to the court below, found that the natural and foreseeable consequence of the "Laws" clause was to encourage union membership, for employees could not be expected to know which of the "Laws" were excluded as illegal.[11] The unions involved in that case have indicated that they intend to file a petition for certiorari. To resolve the conflict

[10] In *Honolulu Star*, however (274 F. 2d at 569), the court also relied upon an express provision of the contract that "The term 'journeymen' and 'apprentices' shall in no way be understood to apply exclusively to members of the * * * Union", a disclaimer not included in the contract here. It also relied upon a practice—again not present here—of hiring non-union men to resolve any remaining ambiguity.

[11] The First Circuit, unlike the court below, found no difference, insofar as effect on employees was concerned, between setting forth an illegal union-security provision in the contract and then purporting to suspend any illegal clauses (*Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78, 81 (C.A. 2), and *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, 723–724 (C.A. 2), affirmed on another point, 347 U.S. 17), and incorporating only the "legal" provisions of rules which are intertwined with illegality (see 278 F. 2d at 13).

in decisions, it is appropriate that the decision in this case be reviewed also.

2. The question presented is important in the administration of the Act. Since 1947, when limitations on union-security provisions were added to the Act, the Board has continually been faced with the problem of determining whether agreements with such provisions exceed the permissible limits. The problem has arisen not only in unfair labor practice cases, like the present one, but also, and much more frequently, in representation cases under section 9, where the legality of the union-security provision determines whether the contract will be considered a bar to an election.[11] One of the principles which the Board has followed in evaluating union-security provisions for these purposes is that the contract must clearly advise the employees that union membership is not required as a condition of employment, and that they have a 30-day period after employment in which to decide whether to join the union. Implementing that principle, the Board has consistently held that such assurance is not provided either where illegal union-security provisions are specifically set forth in a contract and an attempt is made to suspend their effectiveness by providing that they shall not become operative until authorized by law, or where union rules containing such provisions are incorporated in the contract with a caveat limiting the incorporation

[11] See *Fifteenth Annual Report of the National Labor Relations Board* (G.P.O. 1950), pp. 61–62, 112–116; *Twenty-fourth Annual Report of the National Labor Relations Board* (G.P.O., 1959), pp. 24–26, 69–70.

to provisions not inconsistent with law.[13] The decision of the court below, by drawing what we believe is an artificial distinction between the two kinds of clauses (see pp. 18–20, *infra*), has cast doubt on the validity of that well settled Board principle. The decision thus has an impact not only on cases involving the International Typographical Union,[14] but also

[13] See, *e.g.*, the instant case, 122 NLRB 818; *Red Star Express Lines*, 93 NLRB 127, enforced, 196 F. 2d 78, 81 (C.A. 2); *E. F. Shuck Construction Co.*, 114 NLRB 727, enforced, 243 F. 2d 519, 521 (C.A. 9); *Peabody Coal Co.*, 125 NLRB No. 110; *Unique Art Mfg. Co.*, 83 NLRB 1250; *Hickey Cab Co.*, 88 NLRB 327.

[14] In addition to the instant case and the First Circuit case, there are four other pending cases involving similar ITU contract provisions. One, *Los Angeles Mailers Union No. 9*, 127 NLRB No. 71, is pending in the Court of Appeals for the District of Columbia Circuit on the union's petition to review, Nos. 15721 and 15770. Hearings have been held in the other three, and they are pending decision either by the Board or the trial examiner. *Newspaper Agency Corp.* and *Salt Lake City Mailers Local 21*, Case Nos. 20–CA–1556 and 20–CB–658; *Tribune Publishing Co. and San Francisco-Oakland Mailers*, Case Nos. 20–CA–1553 and 20–CB–657; *New York Mailers, Local No. 6*, Case No. 2–CB–2504.

Although the provisions expressly requiring union membership as a working condition were deleted from the ITU's General Laws by amendments effective January 1, 1959, that modification does not affect the present case or the other ITU cases cited above, all of which involve bargaining agreements executed prior to 1959. Moreover, it may fairly be presumed that this modification reflected only an effort by the Union, while its position was being challenged by the Board, to protect itself against further charges. Should the decision below, upholding the Union's position, be sustained or allowed to stand, the Union would be entirely free to restore the former provisions of its General Laws. In the circumstances, therefore, the controversy is in no sense moot, either legally or practically, and the matter is one of substantial continuing importance warranting resolution by this Court.

on all other contracts utilizing the same technique.[15]

3. The court below erred in drawing a distinction between the type of clause here and that in its earlier decision in *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78, 80–81. In that case, the court held that a collective bargaining agreement containing an illegal union-security clause unlawfully encourages union membership, notwithstanding an addendum purporting to suspend any provisions of the contract "affected" by the Taft-Hartley Act until they were declared to be legal. The court stated that the question was not only "whether under principles of contract law the addendum would contractually negative the illegal union-security clauses, but whether it would have the effect of preventing the coercion that would otherwise follow from" the illegal clauses (196 F. 2d at 81). The court agreed with the Board that the addendum would not remove the coercive effect of the illegal clauses in the contract because "the vague language of the addendum would not help the ordinary employee to understand that the union-security clause was no longer binding" (*ibid.*). For, as it added in a

[15] This technique was utilized in the National Bituminous Coal Wage Agreement of 1950, as amended, the nation-wide agreement of the United Mine Workers. That agreement has a clause which requires "as a condition of employment employees shall be, or become members of the [United Mine Workers] to the extent and in the manner permitted by law." In *Peabody Coal Co.*, 125 NLRB No. 110, the Board held that such clause led employees to believe that they had to join the union to get a job, and it was thus unlawful. The *Peabody* decision is now before the Seventh Circuit for review, Nos. 12889 and 12915. Cf. *Lewis* v. *Quality Coal Corp.*, 270 F. 2d 140, certiorari denied, 361 U.S. 929.

subsequent case involving a similar clause, "an employee cannot be expected to predict the validity or invalidity of particular clauses in the contract, and will feel compelled to join the union where a union-security clause of questionable validity exists, if only as a hedging device against a possible future upholding of the clause." *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, 723–724 (C.A. 2), affirmed on another point, 347 U.S. 17. See also, *National Labor Relations Board* v. *Gottfried Baking Co.*, 210 F. 2d 772, 780 (C.A. 2); *National Labor Relations Board* v. *Shuck Construction Co.*, 243 F. 2d 519, 521 (C.A. 9); *National Labor Relations Board* v. *Broderick Wood Products Co.*, 261 F. 2d 548, 557–558 (C.A. 10).

The same considerations are equally applicable here and no meaningful distinction can be made between including illegal union-security provisions in the bargaining contract and then purporting to suspend any "illegal" provisions (the situation in *Red Star*), and incorporating by reference only the "legal" provisions of union rules some of which are illegal (the situation here). For, as the First Circuit recognized in *International Typographical Union* v. *National Labor Relations Board*, 278 F. 2d 6, employees reading the limitation in the incorporation clause would have no more reason than employees reading the addendum in *Red Star* to believe that they could refrain from union membership without risking their jobs. Under the addendum, an employee could decide that union membership was not a condition of employment only if he were willing to assume that the union-security

provisions in the contract were invalid and hence inoperative. Similarly, under the "Laws" clause, an employee could deem himself free from the restraining effect of the closed-shop provisions in the ITU General Laws only if willing to "predict" that there would not be "a possible future upholding of the clause[s]." *Gaynor* case, *supra,* 197 F. 2d at 723–724.

Accordingly, the Board was justified in concluding that the purported inclusion into the contract of the ITU General Laws insofar as they were legal did not nullify the impact of the closed-shop requirements of the Laws in the minds of the employees. The court below erred in setting that conclusion aside, and, its action in so doing negatives "the function of the * * * Board as of one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1960.

APPENDIX

In the United States Court of Appeals for the Second Circuit

No. 45—October Term, 1959

(Argued January 12, 1960 Decided May 20, 1960)

Docket No. 25496

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEWS SYNDICATE COMPANY, INC., AND NEW YORK MAILERS' UNION NO. 6, INTERNATIONAL TYPOGRAPHICAL UNION, AFL–CIO, RESPONDENTS

Before CLARK, HINCKS AND WATERMAN, *Circuit Judges*

On petition of National Labor Relations Board for enforcement, its order, 122 NLRB No. 92, is set aside and the case remanded.

HINCKS, *Circuit Judge:*

The National Labor Relations Board petitions for enforcement of its order[1] which issued as a result of charges filed by a mail room employee of each of two New York newspapers, the New York Daily News,

[1] The Board's decision and order (which were issued on January 2, 1959; corrected on January 21, 1959; and amended on March 2, 1959) are reported at 122 NLRB 818.

published by News Syndicate Company, Inc., herein called the News, and the Wall Street Journal, published by Dow Jones and Company, Inc., herein called the Journal. The charges were brought[2] only against the News and against New York Mailers Union No. 6, International Typographical Union, AFL–CIO, herein called the Union, with whom, both in 1954 and 1956, the News and the Journal had executed two-year collective bargaining agreements covering their mail room employees.[3] The Board held that these contracts,[4] when read in conjunction with their references to the General Laws of the International Typographical Union, herein called the General Laws, constituted *per se* violations of Section 8(b) (1)(A) and (2), and Section 8(a) (1) and (3) of the National Labor Relations Act of 1947, 29 U. S. C. A. § 151 *et seq.*, by the Union and the News, respectively.

The Board also found that the respondents had, in fact, maintained and enforced unlawful Union security and preferential hiring practices at the News and Journal mail rooms, as a result of which the two complaining employees, Burton Randall, at the News, and Julius Arrigale, at the Journal, were unlawfully discriminated against in their employment. Numerous remedies were ordered, which, however, in view of our conclusions on other dispositive issues, we need not discuss.

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[2] Since no charges were filed against the Journal, the Board made no unfair labor practice findings with respect to it.

[3] All New York City newspaper publishers subscribed to the 1954 and 1956 contracts, herein attacked as unlawful, and which are more fully described below.

[4] The two contracts involved herein are identical in their pertinent provisions and they shall, hereafter, be referred to in the singular.

We will first deal with those contractual provisions held to be *per se* violative of the Act. The contract contains nothing which on its face could be said to be violative of the Act. The General Counsel so conceded at the hearing and the Board does not contend otherwise. Rather, it here advances the same argument which was recently rejected by the District of Columbia Circuit. *Honolulu Star Bulletin* v. *N.L.R.B.*, 274 F. 2d 567. Because of our substantial agreement with the penetrating and sound conclusion of that court, we shall have less to say on this aspect of the instant controversy than if the argument had not already had such authoritative judicial consideration.

The Board's position now is that, notwithstanding the seemingly legal contractual provisions which limit mail room employment to "journeymen and apprentices," who are defined quite innocuously in Section 20-b of the contract and without reference to Union membership,[5] see *Evans* v. *International Typographi-*

[5] Excerpt from Section 20-b:

"* * *. Only journeymen and apprentices shall be employed on work covered by this agreement. Apprentices may be employed only in accordance with the ratio of apprentices to journeymen provided elsewhere in this agreement. Journeymen are defined as: (1) Persons who prior to the effective date hereof worked as such in the mailing rooms of papers signatory to this contract; (2) persons who have completed apprentice training as provided in this contract, or have passed a qualifying examination under procedures heretofore recognized by the Union and the Publishers; (3) persons who have passed an examination recognized by both parties to this contract and have qualified as journeymen in accordance therewith. Persons seeking to qualify as journeymen shall be given an examination under nondiscriminatory standards and procedures established by the parties hereto by impartial examiners qualified to judge journeyman competency selected by the parties hereto. In the event agreement cannot be reached on the standards or procedures to be followed, or the examiners to

cal Union, D.C. Ind., 81 F. Supp. 675, 686, the contract is illegal because of a clause therein which incorporates those General Laws of the International Union which are "not in conflict with this contract or with federal or state law" to "govern relations between the parties on conditions not specifically enumerated herein."[*]

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conduct such examinations, the dispute shall be submitted to the Joint Standing Committee whose decision shall be final and binding on the parties."

The General Counsel commented at trial that "My reading of the contract did not indicate that there was any violation with respect to the method by which a person could become a journeyman, at least from the face of the contract. That appeared to be valid as set out in Section 20(b) of the contract."

[*] Section 24 of the contract reads:

"Both parties agree that their respective rights and obligations under this contract will have been accorded by the performance and fulfillment of the terms and conditions thereof and that the complete obligation of each to the other is expressed herein. It is understood and agreed that the General Laws of the International Typographical Union in effect January 1, 1955, not in conflict with this contract or with federal or state law shall govern relations between the parties on conditions not specifically enumerated herein."

Section 38 provides:

"*Mutual Guarantees.* Because of the enactment of the Labor-Management Relations Act of 1947 this contract differs from contracts between these parties over a period of many years. It is understood and agreed, however, for the duration of this contract, that if any provision modified from any preceding contract or excluded from this contract solely because of the restrictions of law, no longer is held to be inoperative, either by legislative enactment or by decision of the court of highest recourse, then such provision automatically shall become a part of this contract, to the extent permitted, and be in force and effect as though it had been originally made a part hereof."

The respondents assert without challenge that no union security clause has appeared in a collective bargaining agreement between the parties since 1948.

Certain of these General Laws concededly condition journeymen and apprentice status on Union membership and they further require each local Union to establish Union employment priority and seniority systems covering its members.[1] Such conditions, the Board held, unlawfully created discriminatory and coercive

[1] Extracts from General Laws:

"ARTICLE V—FOREMEN

"Section 11: All persons performing the work of foremen or journeymen, at any branch of the printing trade, in offices under the jurisdiction of the International Typographical Union, must be active members of the local union of their craft and entitled to all the privileges and benefits of membership.

"ARTICLE VII—MACHINES

"Section 1: * * * None but members [of the ITU] shall be permitted to operate, maintain and service any mailing machinery or equipment when used on work under the jurisdiction of the International Typographical Union. * * *

"Section 2: In machine offices under the jurisdiction of the International Typographical Union, no person shall be eligible as a 'learner' on machines who is not a member of the International Typographical Union. * * *

"ARTICLE X—PRIORITY

"Section 2: Subordinate unions shall establish a system for registering and recording priority standing of members in all chapels, which shall be conspicuously posted or kept in a place within the chapel accessible to members at all times. The priority standing of a member shall stand as recorded.

"Section 5: Any member engaged to serve the International Typographical Union, a subordinate union or to perform work in the interest of the organized labor movement, or any member incapacitated by illness, shall not be deprived of priority standing while so employed or so incapacitated. Such member shall employ while absent the priority substitute competent to perform the work if one is available. The situation holder shall not suffer loss of situation or priority in the event such a substitute is not available. After thirty calendar days the situation shall be filled by priority sub, and considered in the

conditions. It also held illegal the contractual provisions vesting hiring authority in the mail room foremen, who were required to be Union members in good standing, since, reasoned the Board, such foremen would have to follow, both under the terms of the contract and under their Union oath,[8] the closed-shop and priority and seniority system provisions of the General Laws. Finally, on the basis of the foremen's hiring authority under the contract and their Union obligations, the Board concluded that, regardless of the unlawful provisions of the General Laws, the News had unlawfully delegated exclusive mail room hiring to the Union, in a fashion incompatible with the expressed standards required by the Board.

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category of a new situation. Upon reporting for duty full priority rights shall be restored.

"Section 6: Available priority substitute competent to perform the work must be employed on any new situation created because of the absence of a situation holder from his or her situation for more than thirty calendar days, and whose priority is protected under the provisions of other sections of I.T.U. laws or contracts: *Provided*, Should a substitute with greater priority become available such substitute shall be placed on said situation: *Provided, further*, Local unions may establish by contract, for the purpose of avoiding multiple changes in preferred shifts and starting times, for the employment of the available priority substitute after thirty calendar days and continuing to, but not more than ninety days from absence of situation holder."

[8] The Board points to various provisions in the General Laws and local Union constitution, by-laws and rules which require all Union members to comply with all General Laws and local Union laws. These laws in turn provide for closed-shop and preferential hiring conditions. The Union points to both a 1951 amendment of the General Laws which abolished an oath provision requiring discrimination against nonmembers and a 1953 amendment to the ITU's Constitution which abolished a prior provision requiring all members to accord preference to other members.

Mountain Pacific Chapter of the Associated General Contractors, 119 NLRB 883, 893, 897, enforcement denied, *N.L.R.B.* v. *Mountain Pacific Chapter of Assoc. Gen. Con.,* 9 Cir. 270 F. 2d 425.

The respondents[9] raise several serious objections to the Board's conclusion that the contract was illegal on its face. But we find it necessary to go no further than to overrule the Board's holding on the reasoning and on the ground developed in *Honolulu Star Bulletin* v. *N.L.R.B., supra.* See also *Lewis* v. *Quality Coal Corp.,* 7 Cir., 270 F. 2d 140. The facts of the case here fall directly within the scope of the *Honolulu Star* case: the contract here contained no explicit illegal Union security clause and did not purport to incorporate illegal provisions of the General Laws, but only those which were "not in conflict * * * with federal or state law * * *."[10] In this respect the contract is distinguishable from those involved in *Red Star Express Lines* v. *N.L.R.B.,* 2 Cir., 196 Fed. 2d 78, and other cases relied on by the Board, such as *N.L.R.B.* v. *Gottfried Baking Co.,* 2

[9] In addition to the respondents, the International Typographical Union, AFL-CIO, has filed a brief in opposition to the Board's petition, pursuant to this Court's permission.

[10] While in the contract before us the term "journeyman and apprentice" is not explicitly defined to exclude nonunion employees, the contract did not, as in the *Honolulu* case, specifically provide that the term "journeyman and apprentice," was in no way to be interpreted as applying exclusively to Union members. However, we do not read the *Honolulu* opinion as turning primarily upon that provision. Its real thrust was its rejection of the same incorporation by reference argument here urged. Indeed, in an earlier case before the Board, a trial examiner found similar contractual provisions valid and he rejected the "incorporation by reference theory" here advanced. The Board, at that time, did not object to his ruling. *Matter of Kansas City Star Co.,* 119 NLRB 972.

Cir., 210 F. 2d 772, and *N.L.R.B.* v. *Gaynor News Co.*, 2 Cir., 197 F. 2d 719, affirmed 347 U.S. 17. In such cases, hypothetical language in collective bargaining agreements as to the effect of illegal union security provisions which were explicitly included therein was thought to be insufficient to negate their illegal coercive force. The cases make it plain that in scanning a contract for its possible coercive effect on employees the test is whether the natural and foreseeable consequence of the language adopted is to encourage union membership. Cf. *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17, 52. We hold this is not such a contract.

The Board also held that the contract, by its reference to the General Laws, delegated complete control over seniority matters to the Union, and hence tended to encourage Union membership in violation of the Act. In so ruling, the Board relied upon *Matter of Pacific Intermountain Express Co.*, 107 NLRB 837, enforced as modified, *N.L.R.B.* v. *International Brotherhood of Teamsters*, 8 Cir., 225 F. 2d 343; see also *N.L.R.B.* v. *Dallas General Drivers, Etc.*, 5 Cir., 228 F. 2d 702.

As to this we think there is a fatal defect in the Board's minor premise, viz, that unrestricted hiring and seniority control was, under the contract, delegated to the Union. Initially, we note that the contract itself does not purport to make such a delegation: on the contrary, it deals specifically with many crucial problems of employee priority and seniority. Thus, under Section 20–a of the contract, the foreman is given hiring authority, but the order of hiring priority and seniority is clearly spelled out with respect to decreasing and increasing the work

force.[11] Furthermore, under Section 22 the seniority status of employees who are on leave of absence for military and Union reasons is also expressed in the contract.[12] We are, therefore, hard pressed to dis-

[11] Section 20–a of the contract reads:

"The operation, authority, and control of each mail room shall be vested exclusively in the office through its representative, the Foreman. In the absence of the Foreman, the Foreman-in-Charge shall so function. Foremen of Mail Rooms have the right to employ help and may discharge (1) for incompetency, (2) for neglect of duty, (3) for violation of office rules, which shall be kept conspicuously posted, and which shall in no way abridge the civil rights of employees or their rights under accepted International Typographical Union laws, and (4) to decrease the force, such decrease to be accomplished by discharging first the person or persons last employed, either as regular employees or as extra employees, as the exigencies of the matter may require. Should there be an increase in the force, the persons displaced through such cause shall be re-employed in reverse order in which they were discharged before other help may be employed. Upon demand, the Foreman shall give the reason for discharge in writing. The substitute oldest in continuous service shall have prior right in the filing of the first vacancy."

Section 20–b reads:

"The Foreman shall do all the hiring and discharging of all employees engaged in working in the various mail rooms. The Foreman shall have sole authority to issue orders, but he may designate other members to act as Assistant Foreman to direct the work, and all employees shall comply with all such orders issued within the terms of this agreement. Failure to comply shall constitute grounds for discharge."

[12] "Section 22–a. *Union Activity.* When any members of New York Mailers' Union No. 6 are on leave of absence from their jobs because of holding office in New York Mailers' Union No. 6, or the International Typographical Union, or performing any service for these Unions, such members shall be returned to their former or similar positions on the expiration of their leave. The Union shall certify to such absence to the Foreman in writing.

"Section 22–b. In cases where employees are admitted as

cover language indicative of a contractual intent to delegate authority to the Union to determine the seniority of even its own members, since it would appear that any General Laws dealing with seniority matters would be "in conflict with this contract," and would not concern "relations between the parties on conditions not specifically enumerated herein."[13] Moreover, under Section 33 seniority controversies, at least those arising out of the contractual provisions, were subject to the contractual arbitration machinery and were not under exclusive Union control.[14]

Even if we were to assume that the contract incorporates those General Laws which provide that local Unions shall maintain priority and seniority lists of

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residents of the Union Printers' Home, or who enlist in or are drafted for service in the military or naval services of the United States or the Dominion of Canada (or their allies) in time of war or for the duration of any period of national emergency proclaimed by the governments of said countries or during the time when such armed forces are engaged in active combat with the military forces of another nation which presents a threat to the security of the United States or Canada, or those who may actively engage in war work for the American Red Cross, or other similar accredited agencies, their situations and/or priority standing shall be protected and upon again reporting for duty the situations and/or priority standing formerly held by these employees shall be restored to them."

[13] See fn. 6, *supra*.

[14] Section 33-b provides:

"To the Joint Standing Committee shall be referred for settlement all questions which may arise as to the scale of wages, all disputes (except discharge cases) arising out of the operation of this agreement, all disputes regarding the interpretation of any portion of this agreement and any and all disputes (except discharge cases) arising out of, relating to, or affecting the operation of this contract. The Joint Standing Committee must meet within five (5) days from the date on which either party hereto, through its authorized representative, notifies the other party in writing that a meeting is desired and

their members,[15] we could not accept the Board's conclusion that the parties had thereby delegated exclusive control over seniority matters to the Union. The contract expressly provides that "all disputes arising out of, relating to, or affecting the operation of this contract" are subject to arbitration, and surely seniority disputes would be included therein. The Board's contrary view, which is based upon the fact that the General Laws were not subject to arbitration, is not persuasive, since it would be the local seniority lists rather than the General Laws which would be arbitrated. Finally, the uncontradicted testimony of the Union's president that all controversies dealing with priority and seniority were subject to, and had, in fact, gone to arbitration, indicates that the parties interpreted the contract in conformity with the natural meaning we assign to it.

Our holding that the contract did not provide for a closed-shop largely undermines the foundation for the Board's contention that the contractual provision giving Union foremen hiring authority was, *per se*, an unlawful attempt to maintain closed-shop and Union-controlled hiring practices. The foremen, under the contract at least, were not subject to the conflicting obligations of two masters. Regardless of the Union obligations to which, without more,[16] a foreman would be subject by reason of his Union

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shall proceed forthwith to settle any questions before it. Such decision to be final and binding on both parties to this contract."

Section 33–a provides that the Joint Standing Committee shall be composed of four members; two members to be named by the Publisher, and two members by the Union.

Section 33–c provides for a Board of Arbitration, in case of a deadlock in the Joint Standing Committee, said Board to be composed of the Committee and a fifth, disinterested party.

[15] See fn. 7, *supra*.

[16] See fn. 8, *supra*.

membership, Section 20-c of the contract specifically provides that: "The Union shall not discipline the foreman for carrying out the instructions of the publisher or his representative in accordance with this agreement." Furthermore, Section 4 provides: "* * * Foremen * * * shall be appointed and may be removed by the Publishers." By these provisions the parties clearly indicated that the foremen are *solely* the employers' agents and that they are under an obligation to act in accordance with the agreement, in spite of Union ties and obligations which otherwise might control. See *Evening Star Newspaper Co.* v. *Columbia Typographical Union,* 141 F. Supp. 374, aff'd D.C. Cir., 223 F. 2d 697; cf. *Evans* v. *International Typographical Union, supra,* at 683–684. In any event, there is no presumption of law, we hold, that under the terms of this contract a foreman would be guided by his Union obligations rather than those expressed in the collective bargaining agreement between his employer and the Union. *Honolulu Star Bulletin* v. *N.L.R.B., supra; Carpenters District Council, Etc.* v. *N.L.R.B.,* D.C. Cir., 274 F. 2d 564.

Of course, few would doubt that in practice Union foremen could discriminate against nonunion applicants in the exercise of their hiring power. But a mere power to discriminate is not illegal as even the Board appears to recognize. See *Evans* v. *International Typographical Union, supra,* at 684–685; cf. *Chicago Rawhide Mfg. Co.* v. *N.L.R.B.,* 7 Cir., 221 F. 2d 165, 170; *Coppus Engineering Corp.* v. *N.L.R.B.,* 1 Cir., 240 F. 2d 564, 572, 574. Indeed, such recognition is implicit in the Board's order which prohibits the News and the Union from requiring mail room foremen to be Union members *only until such foremen are directly advised by the Union* that they can disregard those provisions of the General Laws which

call for closed-shop conditions and preferential Union hiring. In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives. *N.L.R.B.* v. *Mountain Pacific Chapter of Assoc. Gen. Con., supra,* at 431, cf. *N.L.R.B.* v. *Revere Metal Art Co., Inc., etc.,* 2 Cir., May 6, 1950, —— F. 2d ——.

Nor can we sustain the Board's finding that irrespective of the closed-shop provisions of the General Laws and the foreman's obligation to follow them, his hiring authority, in fact, vested the Union with exclusive control over hiring. The Board's so-called *Mountain Pacific* doctrine even if sound is not applicable here.[17] For the News, not unlike numerous other employers, merely placed its hiring powers in the hands of its principal employee, the foreman who discharged that responsibility on the employer's premises. The News, like any other employer, is of course entitled to employ only Union foremen, if it so desires. Sections 2 (3) & (11), 14(a) of the Act, 29 U.S.C. §§ 152 (3) & (11), 164(a); *Carpenters District Council, Etc.* v. *N.L.R.B., supra;* cf. *A. H. Bull Steamship Co.* v. *National Marine Engineers Beneficial Ass'n,* 2 Cir., 250 F. 2d 332. But, as we have already noted, the foreman's prime allegiance and responsibility was owed to his employer and to the terms of the collective bargaining agreement. We are unable to discover any reasonable ground of support for the conclusion that these hiring

[17] *N.L.R.B.* v. *Mountain Pacific Chapter of Assoc. Gen. Con., supra; N.L.R.B.* v. *Swinerton & Walberg Co.,* 9 Cir., 202 F. 2d 511, cert. denied 346 U.S. 814; *N.L.R.B.* v. *International Association of Heat and Frost Insulators, etc.,* 1 Cir., 261 F. 2d 347; *Eichleay Corp.* v. *N.L.R.B.,* 3 Cir., 206 F. 2d 799; cf. *Morrison-Knudsen Company, Inc., etc.* v. *N.L.R.B.,* 2 Cir., March 2, 1960, —— F. 2d ——.

conditions would lead an employee to legitimately assume, regardless of the actual operations of the arrangement, that his employment opportunities depended upon his Union membership.

We conclude, accordingly, that the parties did not violate the Act by the mere execution and the maintenance of the collective bargaining contract.[18]

The Board also found that quite apart from the supposed illegality of the contract the respondents had in practice maintained and enforced closed-shop and preferential hiring conditions at the News and Journal through their apprenticeship and competency systems, which we will presently describe. The essence of its position is that respondents maintained a system whereby only Union members could obtain permanent mail room employment, and whereby such members were favored over nonmembers in the "shape-up" hiring for other jobs.

The employment practices thus impugned were substantially as follows. Full time employees, known as "regular situation holders," form the bulk of the mail room labor force and they are not required to "shape" for work, i.e., to be hired on a day-to-day basis. The record indicates, without apparent exception, that such employees are all both journeymen and Union members, although, for aught that appears, their Union membership antedated the passage of the Taft-Hartley Act. The foreman frequently exercises his hiring authority in order to both provide replacements for absent regular situation holders and increase the labor force when increases are needed. The first group

[18] Because of our holding herein, we need not pass upon the Union's claim that the Board's concession that the respondents entered into and administered the contract in good faith precludes findings of violations of §§ 8(a)(3) and 8(b)(2). As to this, each side invoked *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17.

to which he turns is that composed of men termed "regular substitutes." These men are available daily to supplement the regular work force of any single publisher and although they are not guaranteed five work shifts per week they normally work that often. It appears that each of them is also both a journeyman and a Union member. The Union "chapel" chairman,[19] maintains a priority list of these regular substitutes, whose priority is determined by the date on which they commence work with a particular employer, and that date is indicated by the deposit of their Union card with the chapel chairman. Regular substitutes are hired by the foreman in the order in which their names appear on this list.

If, as is quite often the case, the size of the day's newspaper requires the employment of additional mailers, the foreman next hires from men who shape the shop "regular situation holders" and "regular substitutes" from other newspapers, in preference to "other extras." The Board describes such "other extras" as "non union shapers" and the Union terms them "casuals without journeyman status." These conflicting descriptions point up the nub of the dispute. The record indicates that many of these "other extras," including the two whose complaints initiated these proceedings, are men engaged in full-time occupations outside the newspaper industry who shape either irregularly or regularly, but at infrequent intervals throughout the week. Thus ostensibly, at least, the hiring procedures are based upon nondiscriminatory contractual criteria, i.e., competency as evidenced by journeyman status, and seniority based upon length of employment as a journeyman with the hiring employer and as a journeyman elsewhere in

[19] The "chapel" chairman is equivalent to a shop steward and each publisher's mail room constitutes a "chapel."

the industry.[20] And the respondents persuasively contend that thus to accord priority in the hire of extras to men who regularly work for the employer as well as to men who have journeyman status with other employers, is entirely consistent with lawful hiring based upon competency and legitimate employee qualifications quite apart from Union membership.

The Board, on the other hand, strongly urges that since outside Union men are always given shaping preference, even if they have never previously worked at the particular hiring shop, as against all nonunion shapers, including those who have shaped at that shop for many years, unlawful discrimination is proved. It insists that the apprenticeship and competency systems are nothing but camouflage to conceal and perpetuate accomplished discrimination. We turn, therefore, to a consideration of these systems.

Two routes were open to a mail room employee who desired to achieve journeyman status—he could either complete an apprentice training program or he could pass a competency examination. While it is true that apprentices were hired by the foremen,[21] as we said above the contract did not place the hiring authority in the Union. Nor does the record indicate any discriminatory practices in the actual hiring of

[20] However, the order of hire among regular situation holders and regular substitutes from other papers was first that of men who had not had five days' work that week and next that of men who had already worked five days.

[21] We note, however, that while under Section 20–b of the contract the foreman was to hire and discharge all employees, still Section 27–b provided that a Joint Apprenticeship Committee, composed of an equal number of Union and employer representatives, was to have jurisdiction over all provisions affecting apprentices and was to have control over and responsibility for the selection of apprentices.

apprentices.[22] Section 20–b of the contract provided that the qualifying examination for prospective journeymen was to be given "by impartial examiners qualified to judge journeyman competency selected by the parties hereto."[23] The examinations were given, in fact, by a committee composed of Union officials and mail room foremen. The only concrete evidence of the manner in which this testing system operated is the incident which led to the filing of charges by Burton Randall, a nonunion extra at the News.

In the spring of 1956 the News, along with other New York City newspaper publishers, concurred in a Union-initiated plan which contemplated the promotion to "regular substitute" status of those extras (none of whom were apprentices) who had earned 15 vacation credits in 1954 and 1955. Such a vacation credit standing indicated that a man had averaged almost three days' work per week. The Union hoped that its members might perform the increased volume of mail room work which had become available in the New York mail rooms. The News accepted the plan and the proposed objective standard of 15 days' vacation credits, allegedly because it recognized the need for additional "regular substitutes." It reasoned that the prospective selectees, who had demonstrated frequency of employment over a considerable period

[22] The record shows that the Union has occasionally requested and received employer permission to shorten the prescribed six-year apprenticeship program. This permission was allegedly given on several occasions when an employer needed additional journeymen. In any event, all apprentices were required to pass the same competency examination as other applicants for journeyman's status, and under Section 27–b of the contract (see fn. 21, *supra*) any question affecting apprentices upon which the Joint Apprenticeship Committee could not agree was subject to arbitration.

[23] See fn. 5, *supra*.

of time, would add the greatest available regularity, dependability and competence to the regular work force. Approximately sixty nonunion men shaped at the News. Of these thirty-one met the proposed standard and were made regular substitutes after they had each passed the journeyman's competency examination. Thereafter, each of the new regular substitutes was hired prior to Randall, although he had shaped at the News for over ten years, which was longer than thirty of them. Randall's full-time outside occupation prevented him from shaping except on Friday and Saturday evenings but his work on these nights while regular was insufficient to give him the 15 days' vacation credit.

The Board found that as a result of these practices Randall, who continued to shape regularly on Friday and Saturday evenings, worked later hours, performed more difficult work, and lost overtime pay. It also found that Randall was denied employment on one Sunday evening, as a result of a Union reprisal against him for his filing of unfair labor practice charges.

We find, however, a dearth of evidence either that a Union journeyman has ever been hired in preference (let alone, an unlawful preference) to a nonunion journeyman,[24] or that the qualifying standards for

[24] Record statements by Union foremen that they would always hire "outside union men" in preference to "non-union extras" do not demonstrate discriminatory hiring practice in the absence of evidence that they or the Union ever committed, in fact, any discriminatory act in denying employment to a non-union journeyman. For aught that appears, these were mere predictions of what they would do if the situation ever arose. *Local 553, International Brotherhood of Teamsters* v. *N.L.R.B.*, 2 Cir., 266 F. 2d 552. Furthermore, on the issue of the motivation behind the hiring plan of extras, this testimony, in context, is of scant help, because (1) the expression "outside union men" is continually interchanged with that of "com-

taking a competency examination are discriminatory. The record is barren of even the slightest hint that there has been discrimination in the conduct of the examinations.[25] Availability, dependability and regularity of service, as well as mere competency, are valid nondiscriminatory considerations in determining the order of hire. The fact that one applicant is as competent as another, does not mean that the other may not properly be preferred on the basis of his other qualifications. And the fact that those achieving status as new "regular substitutes" subsequently became Union members and even indicated their willingness to do so prior to the adoption of the standard, does not indicate, at least on this record, that the standard, seemingly fair, was discriminatory in its effect. Randall admitted that he would have welcomed the opportunity to become a Union member, and for aught that appears in the record, so would the remaining extras who did not meet the established standard.

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petency" and "journeyman," and (2) due to the lack of nonunion journeymen practically all journeymen were Union members. What is even more important, *no* "non-union extras" *were journeymen* and *all* "outside union men" *were journeymen.*

[25] The only offered evidence as to the fate which would await a nonunion man claiming competency who made application for employment as a journeyman, was Union testimony, here unchallenged, concerning past practices under a substantially identical contract between the Printers' Union, New York Typographical Union, No. 6, and the Publishers Association of New York City. Over fifty nonunion journeymen, claiming competency, were allegedly given the identical competency examination as that given apprentices, and while only twenty-six passed, none of those who failed complained of discrimination. Interestingly enough, all of the successful twenty-six applicants went to work prior to their admission into the Union, and while the Union application of one was rejected he remains at work in the trade. See also *Evans* v. *International Typographical Union*, *supra*, at 686–687.

We conclude that the record does not warrant a finding that the hiring system in general, or the competency system in particular, by its discrimination against nonunion applicants, encouraged Union membership.

This conclusion disposes of Arrigale's charge against the Union. For that charge was based only on a claim of unlawful discrimination inherent in the hiring system. But Randall also charged, and the Board found, a specific act of discrimination which caused him loss of employment on one Sunday night. Concededly, Randall did not work on the night in question. And we should hesitate to sustain a finding based solely on Randall's contradicted testimony, that the foreman had told him that he had been instructed by the Union president to reduce Randall's standing on the list of casual shapers for that night. But there was more than this in the record. There was direct evidence, not contradicted we think, that Randall had long stood first on the list of casual shapers for Friday and Saturday nights and also on the Sunday night immediately preceding the Sunday night in question when, according to his direct testimony, for the first time several extras were put to work ahead of him. We cannot say that it would be unreasonable to infer that this abrupt change in his position on the list was due to the fact that he had shortly before filed charges against the respondents, especially in the absence of any other satisfactory explanation for the change. On the whole, we think the finding of discrimination causing Randall loss of one night's employment was sufficiently supported in the record and constituted a violation of §§ 8(a)(4) and 8(b)(2).

We hold, therefore, that we must deny enforcement of the Board's order except so much of it as is based

on the finding of unlawful discrimination against Randall which we have just sustained. However, since the exception covers so small a portion of the order, in the interest of clarity we will deny the petition for enforcement *in toto*, and leave it to the Board, if so advised, to enter an order consistent with our opinion. See *Honolulu Star Bulletin* v. *N.L.R.B.*, *supra*.

Order set aside and case remanded.

In the United States Court of Appeals for the Second Circuit

No. 25496

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEWS SYNDICATE COMPANY, INC., AND NEW YORK MAILERS' UNION NO. 6, INTERNATIONAL TYPOGRAPHICAL UNION, AFL–CIO, RESPONDENTS

DECREE

Before CLARK, HINCKS and WATERMAN,
Circuit Judges

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent Company News Syndicate Company, Inc., its officers, agents, successors, and assigns and Respondent Union, New York Mailers' Union No. 6, International Typographical Union, AFL–CIO, its officers, representatives, agents, successors, and assigns on January 2, 1959. The Court heard argument of respective counsel on January 12, 1960, and has considered the briefs and transcript of record filed in

this cause. On May 20, 1960, the Court being fully advised in the premises, handed down its decision setting aside the Board's order and remanding the case to the Board.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board directed against Respondent Company, News Syndicate Company, Inc., its officers, agents, successors, and assigns and Respondent Union, New York Mailers' Union No. 6, International Typographical Union, AFL–CIO, its officers, representatives, agents, successors, and assigns be and it hereby is set aside and remanded to the Board for entry of an order consistent with the Court's opinion.

CHARLES E. CLARK,
Judge, United States Court of Appeals for the Second Circuit.

C. C. HINCKS,
Judge, United States Court of Appeals for the Second Circuit.

Filed: June 8, 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960